



WYOMING LEGISLATIVE SERVICE OFFICE

# Memorandum

**DATE** April 8, 2022

**TO** Joint Minerals, Business & Economic Development Interim Committee

**FROM** Brian Fuller, Senior Staff Attorney

**SUBJECT** Topic Summary: Industrial Siting

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This brief summary provides an overview of the Industrial Development Information and Siting Act, the Industrial Siting Council, the permitting process for applicants to commence construction on industrial facilities, and 2022 House Bill 47 (Local impact assistance payments).

## **Approved Interim Topic**

Priority No. 3. Industrial Siting Act.

*The Committee will comprehensively review the industrial siting process outlined in Wyoming statute, including local impact assistance payments.*

## **The Industrial Development Information and Siting Act, Generally**

The Legislature enacted the Industrial Development Information and Siting Act (the Act) in 1975.<sup>1</sup> The Wyoming Supreme Court has stated that the Act is "designed to protect Wyoming's environment and the social and economic fabric of its communities from the mischiefs resulting from massive, unregulated industrial development."<sup>2</sup> The Act creates

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<sup>1</sup> 1975 Wyo. Session Laws Ch. 169.

<sup>2</sup> Evanston v. Griffith, 715 P.2d 1381, 1384 (Wyo. 1986). See also Jack L. Van Baalen, Industrial Siting Legislation: The Wyoming Industrial Development Information & Siting Act: Advance or Retreat, 11 Land & Water L. Rev. 27 (1976) (stating that industrial siting legislation was adopted "as a method of attempting to reconcile the need for

an Industrial Siting Council (the Council), which is tasked with reviewing applications for permits that are necessary to begin construction on industrial facilities.

The Act (and permitting requirements under the Act) applies only to "industrial facilities" as defined in the Act. Essentially, the definition of "industrial facility" is a jurisdictional one—if a facility does not satisfy the definition of "industrial facility," the facility isn't subject to the Act's requirements.<sup>3</sup> For purposes of the Act, an industrial facility includes any facility with an estimated construction cost of at least \$96,000,000.<sup>4</sup> The Industrial Siting Council must adjust this cost based on recognized construction-cost indices; currently, the cost threshold to qualify as a facility is approximately \$231,000,000.<sup>5</sup> An industrial facility also includes the following, regardless of construction costs:

- Any commercial waste incineration or disposal facility capable of receiving greater than 500 short tons per day of certain refuse (excluding lands and facilities where wind-turbine blades or inert material may be deposited).<sup>6</sup>
- Any commercial facility that incinerates or disposes of any regulated quantity of hazardous wastes subject to specified federal law.<sup>7</sup>
- Any commercial radioactive waste management facility.<sup>8</sup>
- Before July 1, 1999, any facility constructed solely for the disposal of overburden, waste rock, or refuse from mining.<sup>9</sup>
- Any commercial facility generating electricity from wind and associated collector systems that: (1) has at least 20 wind turbines in all planned phases of installation; or (2) will expand an existing installation to have 20 or more turbines.<sup>10</sup>
- Any wind or solar facility for which a board of county commissioners has authority to issue a permit but the board has referred to the Council.<sup>11</sup>

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commercial and industrial development with the concerns of various elements of society respecting the possible adverse effects of this development").

<sup>3</sup> See Griffith, 715 P.2d at 1385; Laramie River Conservation Council v. Indus. Siting Council, 588 P.2d 1241, 1250 (Wyo. 1978).

<sup>4</sup> W.S. 35-12-102(a)(vii)(intro).

<sup>5</sup> See id.

<sup>6</sup> W.S. 35-12-102(a)(vii)(A).

<sup>7</sup> W.S. 35-12-102(a)(vii)(B).

<sup>8</sup> W.S. 35-12-102(a)(vii)(C).

<sup>9</sup> W.S. 35-12-102(a)(vii)(D). Excluded from this type of facility were facilities permitted or licensed under the land-quality statutes, exempt from land-quality permitting requirements, and those identified in W.S. 35-11-103(d)(v)(A) (certain commercial radioactive waste management facilities).

<sup>10</sup> W.S. 35-12-102(a)(vii)(E).

<sup>11</sup> W.S. 35-12-102(a)(vii)(F).

- Operators of certain wind and solar facilities (those facilities with a rated power capacity of at least one-half megawatt) must obtain a permit from each board of county commissioners where the facility would be located.<sup>12</sup> A board of county commissioners can refer consideration of permitting for the facility to the Industrial Siting Council only if the board of county commissioners finds that there are potentially significant adverse environmental, social, or economic issues that the board does not have the expertise to consider or the authority to address.<sup>13</sup>
- Any facility generating electricity from solar power and associated collector systems that: (1) has a rated power capacity of more than 30 megawatts; (2) would result in a surface disturbance of at least 100 acres; or (3) is an existing facility that will be expanded to have a rated capacity exceeding 30 megawatts or a surface disturbance of at least 100 acres.<sup>14</sup>
- Any wind or solar facility that would otherwise qualify as an industrial facility under the Act but is planned for construction or organized in a way to circumvent the definition of "industrial facility."<sup>15</sup>

## **Industrial Siting Council**

The Act created the Council, which is charged with reviewing applications for facility construction permits and with issuing permits for constructing an industrial facility.<sup>16</sup> The Council consists of seven members who must be Wyoming residents; not more than 75% of the members shall be of the same political party.<sup>17</sup> Members of the Council serve six-year terms and must be confirmed by the Senate.<sup>18</sup> The Council has the following duties and powers:

- Promulgate rules and regulations to implement the Act. (The director or the industrial-siting administrator of the Department of Environmental Quality must administer and enforce any rules the Council promulgates.<sup>19</sup>
- At its discretion, request any administrative agency head to pursue, evaluate, and submit reports required to evaluate an application for a permit under the Act.<sup>20</sup>

<sup>12</sup> W.S. 18-5-502(a); 18-5-501(a)(ii) and (vi).

<sup>13</sup> W.S. 18-5-509(a).

<sup>14</sup> W.S. 35-12-102(a)(vii)(G).

<sup>15</sup> W.S. 35-12-102(a)(vii)(H).

<sup>16</sup> W.S. 35-12-104.

<sup>17</sup> W.S. 35-12-104(a) and (c).

<sup>18</sup> W.S. 35-12-104(b) and (c).

<sup>19</sup> W.S. 35-12-105(b).

<sup>20</sup> W.S. 35-12-104(f).

- Promulgate rules prescribing the decommissioning and site-reclamation standards for wind and solar facilities subject to the Act.<sup>21</sup> These rules preempt any county rules for reclamation associated with wind and solar facilities, and the Council's rules must assure the proper decommissioning and interim and final site reclamation of wind and solar facilities.<sup>22</sup>
- Promulgate rules prescribing financial-assurance requirements for wind and solar facilities that seek and receive permits under the Act.<sup>23</sup> These rules do not apply to facilities that are public utilities and regulated by the Public Service Commission, and the rules preempt any county rules concerning financial assurances.<sup>24</sup> The rules must be designed to provide adequate assurance that the permitted wind and solar facilities will be properly reclaimed and decommissioned at the end of their useful life (or if a permit is revoked).<sup>25</sup>
- Promulgate rules requiring applicants for wind and solar facility permits to provide notice to record owners of mineral rights located on or under the lands where the proposed wind or solar facility will be constructed.<sup>26</sup>
- At its discretion, adopt rules (including fee structures) as appropriate to accept and consider applications that boards of county commissioners refer to the Council.<sup>27</sup>
- Oversee, evaluate, and issue permits for facilities to be constructed.<sup>28</sup>
- Monitor the operations of all facilities for which the Council has granted permits.<sup>29</sup>
- Evaluate requests for local impact assistance payments and issue orders for payments to counties, cities, and towns that experience impacts from industrial facilities that are permitted under the Act.<sup>30</sup>

## Permitting Process

A facility that meets the monetary threshold under the Act or that is a type of facility subject to the Act (regardless of construction cost) must obtain a permit before

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<sup>21</sup> W.S. 35-12-105(d).

<sup>22</sup> Id.

<sup>23</sup> W.S. 35-12-105(e).

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> W.S. 35-12-105(f).

<sup>27</sup> W.S. 35-12-105(g).

<sup>28</sup> W.S. 35-12-106.

<sup>29</sup> W.S. 35-12-117.

<sup>30</sup> W.S. 39-15-111(c); 39-16-111(d).

commencing to construct an industrial facility.<sup>31</sup> Before applying, applicants who intend to commence construction that may qualify as an industrial facility must apply with the Industrial Siting Division for a certificate of insufficient jurisdiction (unless the facility's estimated construction cost is less than 80% of the current monetary threshold or, for a commercial waste incineration facility, the facility isn't capable of receiving 400 short tons or more of waste on a daily basis).<sup>32</sup> Within 30 days after receiving an application for a certificate of insufficient jurisdiction, the Council must issue or deny the certificate.<sup>33</sup>

Applications for permits must contain various information, including: (1) information about the applicant and the applicant's affirmation that all of the required information is included; (2) descriptions of the facility and estimated construction time; (3) estimated number of jobs and job classifications, including the number of employees who will be utilized but who do not live within the affected area; (4) future additions to the facility and why the location was selected; (5) copies of any completed studies of environmental impacts of the facilities; (6) inventories of any estimated discharges, emissions, and solid wastes; (7) proposed procedures to abate any nuisances or dangers to public health or safety; (8) an evaluation of potential impacts (and plans for alleviating those impacts) covering various resources (including scenic, economic, health and infrastructure facilities); (9) the estimated construction cost; (10) what other permits or approvals are needed; (11) the facility's compatibility with state or local land-use plans (if any); (12) a description of ways the applicant will maximize employment and utilization of local or in-state contractors and labor; (13) certification that the governing bodies of all primarily affected local governments were given notice; (14) for wind and solar facilities, information regarding notice to affected landowners, a site reclamation and decommissioning plan, and financial capability to complete reclamation; and (15) any other information the Council requires.<sup>34</sup>

Upon filing an application, an applicant must pay a fee based on the costs of reviewing and processing the evaluation, not to exceed the lesser of 0.5% of the estimated construction cost or \$100,000.<sup>35</sup> Fees are deposited in a separate account and must be

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<sup>31</sup> W.S. 35-12-106(a). For purposes of the Act, "commence to construct" means any clearing of land that would affect the environment of the site of any facility (excluding changes needed for temporary use or studies) and the nuclear fracturing of underground formation (if related to the future development of the facility). W.S. 35-12-102(a)(iii).

<sup>32</sup> Dep't of Environmental Quality, Industrial Siting Council Rules, Ch. 1, § 3.

<sup>33</sup> *Id.* § 3(e).

<sup>34</sup> W.S. 35-12-109(a).

<sup>35</sup> W.S. 35-12-109(b).

used to investigate, review, and process applications.<sup>36</sup> Any unused fees must be refunded to the applicant.<sup>37</sup>

Within ten days of receiving an application for a permit, the DEQ Director must: (1) serve a copy of the application upon the governing bodies of local governments that will be primarily affected (and, for wind and solar facilities, upon affected landowners); (2) publish a summary of the application in at least one general-circulation newspaper in the area of the facility; and (3) file a copy of the application with the county clerk in the county where the facility will be constructed.<sup>38</sup> Within 60 days of receiving the application, the DEQ Industrial Siting Division must obtain information and recommendations from various state agencies relative to the impact of the proposed facility; each agency listed in statute must provide the information within that 60-day deadline, and the information submitted must include the extent of the agency's jurisdiction to regulate impacts and the agency's ability to address cumulative impacts of the facility along with other facilities.<sup>39</sup>

Within 90 days of receiving an application, the DEQ Director must schedule a hearing on the application, give notice to the applicant and local governments (and, for wind and solar facilities, affected landowners), publish notice of the hearing, and hold the hearing in a community as close as practicable to the proposed facility.<sup>40</sup> The applicant, each local government receiving a copy of the application, and any affected landowner receiving notice of the application are deemed parties to the permit proceeding and may participate in the hearing (participation may be waived through inaction or a failure to participate orally at the hearing).<sup>41</sup> The hearing must be conducted in accordance with the contested-case procedures of the Administrative Procedure Act.<sup>42</sup>

Within 45 days of the hearing, the Council must make complete findings, issue an opinion, and make a decision granting or denying the application.<sup>43</sup> The Council can grant a permit subject to the applicant meeting terms, conditions, or modifications of the construction, operation, or maintenance of the facility as the Council deems appropriate.<sup>44</sup> Among other conditions, the Council can require an applicant to furnish a bond to the

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<sup>36</sup> Id.

<sup>37</sup> Id.

<sup>38</sup> W.S. 35-12-110(a).

<sup>39</sup> W.S. 35-12-110(c).

<sup>40</sup> W.S. 35-12-110(f).

<sup>41</sup> W.S. 35-12-111(a) and (b).

<sup>42</sup> W.S. 35-12-112.

<sup>43</sup> W.S. 35-12-113(a).

<sup>44</sup> Id.



Industrial Siting Division.<sup>45</sup> The Council must grant a permit (either as proposed or subsequently modified) if the Council finds and determines all of the following.

- The proposed facility complies with all applicable law.
- The facility will not pose a threat of serious injury to the environment or to the social and economic condition or inhabitants (current and expected) in the affected area.
- The facility will not substantially impair the health, safety, or welfare of the inhabitants.
- The applicant has financial resources to decommission and reclaim the facility. (For wind and solar facilities, the Council must also find that the applicant has sufficient financial resources to construct, maintain, and operate the facility.)<sup>46</sup>

Along with its decision, the Council must issue an opinion stating in detail the reasons for the decision and serve that decision upon each party, the applicant, and local governments to be substantially affected by the facility.<sup>47</sup> Certain approved facilities must also remit a waste-management surcharge to the Industrial Siting Division; the minimum surcharge is either \$10 or \$25 per short ton of waste (depending on the type of waste), and the surcharge is deposited into the general fund.<sup>48</sup>

Any party aggrieved by the Council's final decision may seek judicial review in any district court in which the major portion of the proposed facility is to be located within 30 days after the Council issues the final decision.<sup>49</sup> After the Council issues a permit, no state, intrastate regional agency, or local government can require any further approval, additional conditions, or an additional permit for the construction, operation, or maintenance of any industrial facility (except that the DEQ and Public Service Commission retain authority to regulate the facilities according to state and federal standards or, for the PSC, authority relative to rates, certificates of convenience and necessity, safety regulations, and interchange of service).<sup>50</sup>

In lieu of this standard application process, the Act also authorizes any person seeking to construct an industrial facility to submit a written request for a waiver of the Act's application provisions. A request for a waiver requires the applicant to submit much of the same information as in the application but excludes requirements to submit

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<sup>45</sup> W.S. 35-12-113(e).

<sup>46</sup> W.S. 35-12-113(a)(i)–(iv).

<sup>47</sup> W.S. 35-12-113(d) and (f).

<sup>48</sup> W.S. 35-12-113(g).

<sup>49</sup> W.S. 35-12-114(a).

<sup>50</sup> W.S. 35-12-115(a).

evaluations of potential impacts and plans for alleviating those impacts.<sup>51</sup> Within seven days of receiving a waiver request, the DEQ Director must: (1) serve notice of the waiver request to the affected local governments (and, for wind and solar facilities, to affected landowners); (2) publish a summary of the request in at least one general-circulation newspaper within the area of the proposed facility; and (3) file a copy of the request with the county clerk in the county where the facility is proposed to be located.<sup>52</sup> Within 14 days after receiving a waiver request, the DEQ Director must also schedule and conduct a public meeting; provide notice of that meeting to the applicant; publish notice of the meeting; and hold the meeting in a community as close as practicable to the proposed facility.<sup>53</sup> At this meeting, the applicant must present information to describe the proposed facility and the estimated impacts on the affected local governments.<sup>54</sup> Within 14 days after the meeting, the applicant must meet with the DEQ Director to determine the mitigation required to minimize any adverse impacts resulting from the proposed facility.<sup>55</sup>

Within 50 days of the waiver request, the DEQ Director must: (1) schedule and conduct a public hearing; (2) notify the applicant and local governments (and, for wind and solar projects, the affected landowners) of the hearing; (3) publish notice of the hearing; and (4) hold the hearing in a community as close as practicable to the proposed facility.<sup>56</sup> Unlike a hearing for a permit application, this waiver hearing is not subject to the contested-case procedures of the Administrative Procedure Act.<sup>57</sup>

At the hearing, the applicant must present evidence necessary to demonstrate to the Council that: (1) the facility would not produce an unacceptable environmental, social, or economic impact; (2) the applicant has reached agreements with affected local governments on the mitigation required to alleviate adverse effects resulting from the facility; and (3) the applicant has financial resources to decommission and reclaim the facility (and, for wind and solar applicants, financial resources to construct, operate, and maintain the facility).<sup>58</sup>

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<sup>51</sup> W.S. 35-12-107(a) and (b).

<sup>52</sup> W.S. 35-12-107(c).

<sup>53</sup> W.S. 35-12-107(d).

<sup>54</sup> W.S. 35-12-107(e).

<sup>55</sup> W.S. 35-12-107(f).

<sup>56</sup> W.S. 35-12-107(g).

<sup>57</sup> W.S. 35-12-112.

<sup>58</sup> W.S. 35-12-107(h).



Within 10 days of the hearing, the Council must make complete findings, issue an opinion, and make a decision to grant or deny the waiver request.<sup>59</sup> The Council must grant a waiver (either as proposed or modified) if the Council finds that:

- The facility would not produce an unacceptable environmental, social, and economic impact.
- The applicant has discussed the proposed facility with all local governments potentially affected by the facility.
- The proposed facility complies with all local ordinances and land-use plans.
- The applicant has financial resources to decommission and reclaim the facility (and, for wind and solar applicants, financial resources to construct, operate, and maintain the facility).<sup>60</sup>

No waiver can be granted if two or more local governments are not satisfied that the facility (considering the voluntary agreements with the applicant) represents an acceptable impact on the local governments.<sup>61</sup> If the Council decides to waive all of the application requirements, it must issue a permit for the facility.<sup>62</sup> If the Council decides to waive only part of the application requirements, the Council must issue an order specifying which applications requirements are not required for the applicant.<sup>63</sup>

Finally, there are special requirements if a proposed facility would require at least 800 acre-feet of the waters of this state annually; an applicant of that facility would have to prepare and submit to the state engineer a water-supply and water-yield analysis with a request for an opinion from the state engineer on the quantity of water available for the proposed facility.<sup>64</sup>

### **Post-Permit Duties**

After a permit or waiver has been issued, the Council and the Industrial Siting Division (utilizing to the fullest extent possible the staff and resources of all state agencies) has continuing authority and responsibility for: (1) monitoring the operations of all permitted facilities; (2) assuring continued compliance with the Act; and (3) discovering and preventing noncompliance with the Act.<sup>65</sup> The Department of Environmental Quality

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<sup>59</sup> W.S. 35-12-107(j).

<sup>60</sup> W.S. 35-12-107(j)(i)–(iv).

<sup>61</sup> W.S. 35-12-107(k).

<sup>62</sup> W.S. 35-12-107(m).

<sup>63</sup> Id.

<sup>64</sup> W.S. 35-12-108.

<sup>65</sup> W.S. 35-12-117(a).

retains continuing and exclusive authority for monitoring and assuring compliance with air, water, and land quality laws, solid waste management, and any permit conditions that the Council orders relating to solid waste, air, land, and water quality.<sup>66</sup>

A permit may be revoked or suspended for:

- Any material false statement in the application or in accompanying materials, if a true statement would have warranted the Council's refusal to grant a permit.
- Failing to comply with the terms or conditions of the permit (after notice of the failure and a reasonable opportunity to correct it).
- Violating the Act or any of its regulations, or any Council order.<sup>67</sup>

## **Exemptions**

Finally, the Act exempts certain types of industrial facilities from the Act entirely or from certain requirements of the Act, as follows:

- Nonmineral processing facilities that are constructed in existing industrial parks are exempt from the payment of fees and certification procedures but must furnish certain basic application information.<sup>68</sup>
- State and local governments (and their agencies) are exempt from the application and permit procedures, but before commencing construction on any facility, they must furnish basic application information.<sup>69</sup>
- The construction, operation, and maintenance of the following electrical systems are exempt from the entire Act: (1) electric transmission lines with a maximum operating voltage of 160,000 volts (except for certain lines associated with wind facilities); (2) oil-and-gas drilling facilities; (3) all pipelines (except for coal slurry pipelines); (4) oil-and-gas producing facilities; and (5) oil-and-gas wellfield activities.<sup>70</sup>

These activities are not included as part of the Council's or DEQ's application review, and the Council lacks jurisdiction over these activities (but these applicants must still submit basic application information to the Council).<sup>71</sup>

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<sup>66</sup> W.S. 35-12-117(b).

<sup>67</sup> W.S. 35-12-116.

<sup>68</sup> W.S. 35-12-119(a).

<sup>69</sup> W.S. 35-12-119(b).

<sup>70</sup> W.S. 35-12-119(c).

<sup>71</sup> W.S. 35-12-119(d).

## 2022 House Bill 47 (Local impact assistance payments)

In the 2022 Budget Session, the Legislature enacted House Bill 47, Local impact assistance payments.<sup>72</sup> Under current law, impact assistance payments are provided from sales and use taxes to counties, cities, and towns to address the unmitigated impacts of industrial facilities that are constructed within their boundaries.<sup>73</sup> The Industrial Siting Council determines the amounts of the impact assistance payments, which currently cannot exceed 2.76% of the total estimated material costs of the facility.<sup>74</sup> After 2022 House Bill 47, the maximum amount of impact assistance payments is as follows:

- For industrial facilities with total estimated materials costs of \$350,000,000 or less, the maximum allowable percentage is 2.25%, except that the Council may increase the maximum allowable percentage to 2.76% if the Council specifically finds that 2.25% is insufficient to mitigate the identified impacts.<sup>75</sup>
- For industrial facilities with total estimated materials costs greater than \$350,000,000 but less than \$850,000,000, the maximum allowable percentage is 2%.
- For industrial facilities with total estimated materials costs of \$850,000,000 or more, the maximum allowable percentage is 1.5%.

2022 House Bill 47 also made the following changes to the process for impact assistance payments:

- In determining the distribution ratio of the impact-assistance payment among impacted counties, cities, and towns, the Council may consider the extent and location of the unmitigated impacts, the populations of the impacted communities, any disproportionate impacts on smaller communities, and any other equitable factor.
- When the Council issues an order for an impact-assistance payment, the Council must include specific findings of fact detailing the basis for the total dollar amount determination. If the impacted county, city, or town requests it, the Council must

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<sup>72</sup> 2022 Wyo. Session Laws, Ch. 29 (<https://wyoleg.gov/Legislation/2022/HB0047>).

<sup>73</sup> W.S. 39-15-111(c); 39-16-111(d). During the 2021 Interim, LSO prepared a research memorandum on industrial development impact mitigation in other states; that memo is available here: <https://wyoleg.gov/InterimCommittee/2021/09-202108122-02DevelopmentImpactMitigation-AComparisonofWyomingandOtherStates.pdf>.

<sup>74</sup> W.S. 39-15-111(c); 39-16-111(d).

<sup>75</sup> W.S. 39-15-111(c). If the Industrial Siting Council increases this percentage, the Council must report to the Joint Appropriations Committee and this committee within ten business days. W.S. 39-15-111(c).

also include its justification for rejecting (in whole or in part) an application for an impact-assistance payment.

- Each county, city, and town that receives an impact-assistance payment must provide an annual report to the Council describing how the payment was expended. The report must be submitted within one year after the payment is approved and then again annually until all distributions are expended.
- A definition of "unmitigated impact" is inserted. For purposes of impact-assistance payments, an unmitigated impact means an expense: (1) that a county, city, or town incurs and is directly or indirectly attributable to the construction of an industrial facility; (2) that is not otherwise mitigated by any other entity; (3) that is for medical services, fire and law enforcement services, roads, and public utilities; and (4) that has not been addressed by a previous impact-assistance payment (unless the county, city, or town can demonstrate that the expense is new or ongoing).

These changes to impact-assistance payments apply only to applications for industrial facility permits filed on and after July 1, 2022.<sup>76</sup>

This summary provides a brief overview of industrial siting and impact-assistance payments. Please let me know if you have any questions or need further information.

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<sup>76</sup> 2022 Wyo. Session Laws Ch. 29, § 2.